

EXHIBIT 38

1

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK-----x
In Re:BERNARD L. MADOFF INVESTMENT
SECURITIES LLC, Adv. Pro. No.
08-01789 (BRL)
Debtor.-----x
IRVING H. PICARD, Trustee for the
Liquidation of Bernard L. Madoff
Investment Securities LLC,Plaintiff, Adv. Pro. No.
09-1182 (BRL)

v.

J. EZRA MERKIN, GABRIEL CAPITAL,
L.P., ARIEL FUND LTD., ASCOT
PARTNERS, L.P., GABRIEL CAPITAL
CORPORATION,

Defendants.

-----x
CONFIDENTIALVIDEOTAPED DEPOSITION of NOREEN HARRINGTON, as
taken by and before NANCY C. BENDISH, Certified
Court Reporter, RMR, CRR and Notary Public of the
States of New York and New Jersey, at the offices of
Baker Hostetler, 45 Rockefeller Plaza, New York, New
York on Tuesday, October 1, 2013, commencing at
10:10 a.m.

1 A P P E A R A N C E S:

2

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38 ALSO PRESENT:

39

40 JUAN TORRES, Video Technician

41

42

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11 SSKW00001646-1674. 5512 Trustee 131 Document titled "Ascot Partners,
13 LP," SSKW00007066. 76

14 Trustee 132 Letter 10/10/02, SSKW00020023-24. 87

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01:57:05 1 A. Yes. In 2003, we were interviewing
01:57:07 2 managers for both of our funds, the upcoming fund,
01:57:11 3 the levered fund that would be launched in
01:57:13 4 September -- I mean, in -- excuse me, in July of
01:57:16 5 2003, and we had hoped to launch that fund with 50
01:57:22 6 to 100 million.

01:57:28 7 Q. What is a -- it's entitled -- what is
01:57:32 8 a levered fund?

01:57:34 9 A. It would be a fund of funds that uses
01:57:37 10 leverage. So, in the fund that we currently had,
01:57:40 11 the security fund, no leverage was used. So if we
01:57:44 12 had \$10 million, we invested \$10 million. In the
01:57:48 13 levered fund, we were doing it through a bank that
01:57:53 14 would lend us money. So, if we gave that bank \$10
01:57:58 15 million, we could invest \$20 million, or \$30
01:58:05 16 million, depending on the leverage agreement we had
01:58:07 17 with the bank.

01:58:09 18 Q. And which Merkin fund was [REDACTED]
01:58:13 19 [REDACTED] considering investing in the [REDACTED]
01:58:16 20 fund?

01:58:19 21 A. I think at this point in time all of
01:58:22 22 them would have been on the table, except for, you
01:58:26 23 know, Ascot and Long Horizons -- let me just back up
01:58:31 24 a second.

01:58:33 25 When you're receiving leverage from a

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01:58:35 1 bank, they're going to look at the underlying
01:58:38 2 liquidity of the funds that we put together, and so
01:58:42 3 they're going to -- they're going to look at all the
01:58:45 4 funds we put together. And I think Ascot and
01:58:47 5 Gabriel, my recollection, and Long Horizon -- I
01:58:53 6 actually -- and I'll take it back, I think all of
01:58:54 7 the funds were on the table to be invested in the
01:58:56 8 [REDACTED].

01:59:07 9 Q. Did -- was a meeting set up with Ezra
01:59:10 10 Merkin?

01:59:11 11 A. Yes.

01:59:12 12 Q. Did you attend that meeting?

01:59:17 13 A. There was a meeting set up in
01:59:23 14 February when we returned from London, and then it
01:59:26 15 got cancelled.

01:59:27 16 Q. Was it ever rescheduled?

01:59:29 17 A. Not until much later, sometime
01:59:36 18 around -- I'm not perfectly clear on these dates,
01:59:38 19 but sometime around June.

01:59:44 20 Q. And did you meet with Ezra Merkin in
01:59:46 21 June of 2003?

01:59:47 22 A. I did.

01:59:48 23 Q. And I assume Mr. Merkin was there?

01:59:52 24 A. Yes.

01:59:53 25 Q. Was anybody else there?

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01:59:55 1 A. [REDACTED].

01:59:57 2 Q. Nobody else?

01:59:58 3 A. No, just the three of us.

02:00:00 4 Q. And did you tell Mr. Merkin why you
02:00:09 5 had requested the meeting?

02:00:14 6 A. We told Mr. Merkin that we had a new
02:00:16 7 fund that we were going to be launching, and we had
02:00:20 8 to do a review of -- a review of his funds. And I
02:00:28 9 think [REDACTED] also told him that since I had never sat
02:00:32 10 down with him, it was important that I had a better
02:00:35 11 understanding of his management of the funds.

02:00:45 12 Q. Did you do any preparation for your
02:00:48 13 meeting with Mr. Merkin?

02:00:49 14 A. I did.

02:00:50 15 Q. And what did you do to prepare for
02:00:52 16 your meeting with Mr. Merkin?

02:00:53 17 A. I looked at all the documentation
02:00:55 18 that we had on file. That would include attribution
02:00:59 19 letters, subscription documents. It would include
02:01:07 20 pitchbook, the returns that he had gotten to date,
02:01:12 21 his CV is in there, any notes that [REDACTED] had from
02:01:21 22 previous meetings would have all been in the file
02:01:24 23 that I would have looked at. And I had looked at
02:01:26 24 that file prior to this June meeting, anyway.

02:01:34 25 Q. And how did you get information about

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02:01:39 1 Merkin's returns?

02:01:42 2 A. Well, we had all the returns in the
02:01:45 3 file and they were also included on the back of the
02:01:49 4 document change letter, which would have been in the
02:01:52 5 file, and -- and [REDACTED] and I would have worked to
02:01:58 6 formulate questions for the meeting.

02:02:07 7 Q. When you -- when the meeting
02:02:10 8 commenced, did you ask questions of Mr. Merkin about
02:02:14 9 his funds?

02:02:15 10 A. I did.

02:02:16 11 Q. And what questions did you ask him?

02:02:21 12 A. I don't -- I do not recall the exact
02:02:24 13 give and take of I asked this question and...

02:02:29 14 Q. Did -- did you ask about his funds'
02:02:33 15 investment strategies?

02:02:35 16 A. I did.

02:02:35 17 Q. Do you recall any specifics about
02:02:38 18 what you asked him about his funds' investment
02:02:42 19 strategies?

02:02:43 20 A. I asked him about the collaring of
02:02:50 21 options and -- and I don't remember -- this part is
02:02:56 22 difficult for me because I -- if I had my hard drive
02:03:00 23 with all my data in it, I'd be able to tell you what
02:03:04 24 I asked because it would be there. But that -- that
02:03:09 25 file went missing and so I know what I ascertained

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02:03:14 1 in the meeting, but to say that I remember the exact
02:03:17 2 dialogue back and forth is incorrect.

02:03:20 3 Q. Do you remember generally the
02:03:22 4 discussion?

02:03:22 5 A. Yes.

02:03:23 6 MR. STEINER: Objection to form.

02:03:25 7 Q. Go ahead.

02:03:26 8 A. I do.

02:03:26 9 Q. Can you provide your general
02:03:28 10 recollection --

02:03:28 11 A. Sure.

02:03:29 12 Q. -- of your conversation with
02:03:32 13 Mr. Merkin?

02:03:33 14 MR. STEINER: Objection to form.

02:03:35 15 A. I can.

02:03:36 16 So in the meeting we had some small
02:03:37 17 talk and then we went on to ask him some questions,
02:03:42 18 particularly I think -- I believe we started with
02:03:44 19 Ascot. They -- one of the aspects of Ascot was the
02:03:48 20 options strategy, but also risk arbitrage and
02:03:51 21 distressed debt. And so I know what I ascertained,
02:04:01 22 although it's very difficult for me sitting here
02:04:04 23 today to tell you the exact dialogue, but I know I
02:04:06 24 ascertained some things in the meeting.

02:04:08 25 So I left the meeting knowing they

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02:04:10 1 went to cash at the end of a quarter. I left the
02:04:13 2 meeting knowing that they used OTC options, which
02:04:16 3 was troublesome to me. I know that -- I had asked
02:04:25 4 him some specific trading opportunities, and I'm not
02:04:30 5 sure whether I put a date on that or whether it was
02:04:35 6 more open-ended, but one of the things that I do do
02:04:39 7 is I will sometimes look at the returns and if he
02:04:44 8 did very well in a month where the market did very
02:04:47 9 badly, I would hone in on that and say what
02:04:51 10 transactions did you have on that month that allowed
02:04:54 11 you to beat everyone else?

02:05:00 12 But those are the -- that are
02:05:01 13 standard operating procedure for Noreen Harrington.
02:05:05 14 So, I -- I go to specific sort of questions and...

02:05:13 15 Q. When you say that they went to cash
02:05:14 16 at the end of the quarter, what did you mean by
02:05:17 17 that?

02:05:18 18 A. That they would sell out whatever
02:05:20 19 positions they had before the end of the quarter,
02:05:23 20 and so they would have or retain cash -- cash
02:05:27 21 positions only at the end of the quarter.

02:05:29 22 Q. Do you recall which funds you -- you
02:05:31 23 were talking about that went to cash at the end of
02:05:34 24 the quarter?

02:05:35 25 MR. STEINER: Objection to form.

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02:05:38 1 A. I -- I think everything was on the

02:05:39 2 table, so I'm not -- I'm not going to say I remember
02:05:42 3 exactly.

02:05:44 4 Q. When you say you left the meeting

02:05:52 5 knowing they used OTC options, what do you mean by
02:05:55 6 OTC options?

02:05:57 7 A. Over-the-counter options. It's --

02:06:00 8 it's when you do a private option with a dealer firm
02:06:07 9 rather than an exchange traded option.

02:06:10 10 Q. And you said that you left the

02:06:13 11 meeting knowing they used OTC options, which was
02:06:17 12 troublesome to me. Why was it troublesome to you?

02:06:21 13 MR. STEINER: Objection to form.

02:06:23 14 A. Just that it's a very -- it's a more
02:06:24 15 expensive way to execute what seemed to be -- to me
02:06:26 16 to be a simple strategy, and I didn't really
02:06:30 17 understand why you would have to use OTC options for
02:06:36 18 the strategies he was deploying.

02:06:40 19 Q. You said that you asked about some
02:06:42 20 specific trading opportunities. Do you recall any
02:06:47 21 of the answers that Mr. Merkin gave to you?

02:06:51 22 A. I recall being extremely troubled
02:06:54 23 because his knowledge of specific transactions was
02:06:57 24 extremely weak, if -- if any knowledge.

02:07:13 25 Q. What do you mean by his -- his

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02:07:15 1 knowledge of specific transactions was extremely
02:07:20 2 weak, if any knowledge?

02:07:22 3 MR. STEINER: Objection to form.

02:07:23 4 Q. You can answer.

02:07:25 5 A. I would say this of traders, having
02:07:28 6 been one. You remember '87, you remember all these
02:07:31 7 sort of points in your career, similar to a
02:07:35 8 ballplayer who wins a high school championship with
02:07:38 9 a home run. When people talk about it, they talk
02:07:40 10 about it as if it happened yesterday. And in my
02:07:44 11 opinion, traders are no different. They really are
02:07:47 12 intimate with their portfolios. And especially when
02:07:50 13 they beat their competitors, they generally have
02:07:53 14 very strong knowledge of how they were superior.

02:07:58 15 And I often ask questions because
02:08:01 16 those questions allow me to ascertain the kind of
02:08:04 17 risk they took during that period that made them
02:08:08 18 better or -- I will also ask questions about when
02:08:14 19 they lost. It's very important to me to really get
02:08:17 20 to know this manager and understand how he dealt
02:08:19 21 with the losing hand, as well as how he dealt with
02:08:23 22 the winning hand.

02:08:25 23 So, I had an uneasy feeling that
02:08:34 24 Merkin didn't seem terribly involved in the
02:08:39 25 positions he was supposed to own.

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02:08:50 1 Q. Other than the things you've

02:08:52 2 testified to, do you recall anything else about the
02:08:54 3 conversation?

02:08:57 4 A. It's a long time ago, but I

02:09:01 5 remember -- I remember looking at 13Ds. And I'm not
02:09:04 6 sure what drove me to that, except for trying to put
02:09:07 7 a handle on -- and that's actually a little bit more
02:09:10 8 Madoff side than the Merkin side.

02:09:15 9 But I remember --

02:09:15 10 Q. Did the topic of Madoff come up in
02:09:18 11 this conversation?

02:09:18 12 A. It did.

02:09:19 13 Q. And can you recall any specifics
02:09:21 14 about how Madoff came up in this conversation with
02:09:23 15 Merkin?

02:09:24 16 A. Prior to the meeting I knew that he
02:09:27 17 could give to third parties. And, again, my
02:09:35 18 recollection is not perfect, but you see the email
02:09:40 19 from February and I had looked at returns for
02:09:45 20 multiple months at this point, from October through
02:09:49 21 to the meeting in June. I also saw I had return
02:09:56 22 profiles and there was correlations with Merkin, and
02:10:03 23 so I -- at some point I asked him about his
02:10:07 24 relationship with Bernie Madoff.

02:10:11 25 Q. And do you recall what Merkin's

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02:10:14 1 response was?

02:10:16 2 A. He affirmed to me in the meeting that
02:10:18 3 he had every right under his documentation to give
02:10:23 4 money to Bernie Madoff.

02:10:24 5 Q. Did you form an understanding as to
02:10:27 6 whether or not Merkin gave money to Madoff?

02:10:30 7 A. It was 100 percent clear to me when I
02:10:32 8 left that meeting that he had given money to Bernie
02:10:35 9 Madoff. The question that's still unresolved for
02:10:40 10 Noreen Harrington was how much, what percentage of
02:10:42 11 the money that he had of mine was actually going to
02:10:45 12 Bernie Madoff.

02:10:47 13 Q. When you say that he had given money
02:10:49 14 to Bernie Madoff, were you referring to Merkin's
02:10:56 15 funds had given money to Madoff?

02:10:58 16 MR. STEINER: Objection to form.

02:10:59 17 Q. Or were you referring to his personal
02:11:01 18 funds?

02:11:01 19 A. Well, the way I said the question --
02:11:03 20 or the way I answered it, I was referring to Ezra
02:11:06 21 Merkin. But I probably more clearly should have
02:11:09 22 said that his funds were giving money to Bernie
02:11:13 23 Madoff. And, again, I don't want to mess this up.
02:11:18 24 Not personally, I probably should have said the
02:11:21 25 entity of Bernie Madoff.

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02:11:36 1 Q. Do you recall -- did you ask him

02:11:38 2 anything else about Bernie Madoff?

02:11:46 3 A. Not that I recall at this -- not that

02:11:48 4 I recall.

02:11:53 5 Q. Did you discuss the correlation of

02:11:58 6 Madoff's funds with Merkin's funds?

02:12:01 7 MR. STEINER: Objection to form.

02:12:06 8 A. I -- I do not recall whether we
02:12:09 9 talked specifically about those correlations. I --
02:12:18 10 I don't recollect. But...

02:12:23 11 Q. Did you discuss Madoff's strategy
02:12:26 12 with Merkin?

02:12:27 13 A. I knew going into the meeting that
02:12:29 14 they shared a similar strategy. As it was explained
02:12:34 15 to me internally at [REDACTED], the strategy
02:12:38 16 that Madoff deployed was an options strategy around
02:12:43 17 stocks, similar to the strategy that Ezra Merkin
02:12:47 18 deployed, although I probably would have -- if I had
02:12:53 19 a differentiation between the two, it might have
02:12:57 20 been on the -- the duration of the transactions. So
02:12:59 21 one being -- Madoff being shorter, Merkin being a
02:13:03 22 bit longer, that his strategy might go out longer.
02:13:09 23 But he has just told me in the meeting that he goes
02:13:11 24 to cash, so could have been wrong on that, too.

02:13:19 25 Q. When you said "he has just told me in

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02:13:22 1 the meeting that he goes to cash," who are you
02:13:25 2 referring to?

02:13:26 3 MR. STEINER: Objection to form.

02:13:28 4 A. Ezra Merkin.

02:13:38 5 Q. Did you discuss conducting due
02:13:44 6 diligence of Merkin's funds with Merkin?

02:13:47 7 A. We did.

02:13:47 8 Q. And what did you discuss?

02:13:50 9 MR. STEINER: Objection to form.

02:13:52 10 MS. GRIFFIN: Can you tell me the
02:13:53 11 basis of the objection?

02:13:54 12 MR. STEINER: Well, the prior
02:13:55 13 question was: Did you discuss conducting due
02:13:58 14 diligence of Merkin's funds with Merkin? So we did,
02:14:02 15 and so you can ask her what you discussed, but I
02:14:04 16 suspect --

02:14:04 17 MS. GRIFFIN: I said what did you
02:14:06 18 discuss, okay.

02:14:07 19 MR. STEINER: But I suspect that the
02:14:09 20 questions together are going, you know -- well, I
02:14:12 21 think -- there is an objection. I think that
02:14:16 22 you're -- I'm protecting the record that I don't
02:14:18 23 know that the witness was following the questions.
02:14:22 24 But, you know...

02:14:24 25 MS. GRIFFIN: Okay.

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02:14:25 1 Q. To be clear, did you discuss

02:14:28 2 conducting diligence of Merkin's funds with Merkin?

02:14:31 3 A. I did.

02:14:31 4 Q. And what did you discuss with Merkin?

02:14:33 5 A. I explained to Ezra Merkin the

02:14:37 6 process that [REDACTED] or [REDACTED] would

02:14:40 7 embark on in order to make more investments in his

02:14:44 8 funds.

02:14:46 9 Q. And did you describe that process to
02:14:48 10 Mr. Merkin?

02:14:50 11 A. At length, yes.

02:14:51 12 Q. And what did you say to Mr. Merkin
02:14:53 13 about your process?

02:14:55 14 MR. STEINER: Objection to form.

02:14:58 15 MS. GRIFFIN: Could you --

02:14:59 16 MR. STEINER: Well, she's already
02:15:00 17 testified several times that she doesn't remember
02:15:02 18 the specifics of the conversation and now you're
02:15:04 19 trying to ask her again to testify to this, which
02:15:09 20 is, I think, going to be contradictory to what she's
02:15:13 21 already testified to quite a few times, that she
02:15:15 22 doesn't remember the specifics of the conversation
02:15:18 23 that's now a decade old, so...

02:15:20 24 MS. GRIFFIN: Okay.

02:15:20 25 Q. And what did you say to Mr. Merkin

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02:15:22 1 about your process?

02:15:26 2 A. It was a fairly rote conversation I
02:15:31 3 had with every single money manager, similar to them
02:15:35 4 getting to know -- us getting to know their funds.
02:15:38 5 It was imperative, we felt, that they would know who
02:15:42 6 we were, as well.

02:15:44 7 And so what I said to every manager,
02:15:46 8 including Ezra Merkin, was that we have a process
02:15:50 9 that we deploy. And this is very similar to what I
02:15:53 10 said our due diligence process was this morning,
02:15:56 11 which is we have multiple meetings with managers, we
02:16:01 12 sit with the junior people, we look at trade
02:16:05 13 tickets, we -- we ask a whole bunch of questions
02:16:09 14 regarding the management of the money, the
02:16:13 15 liquidity, the decision-making, all the particulars
02:16:18 16 I ran through earlier.

02:16:19 17 And then we would circle back to Ezra
02:16:22 18 Merkin when our process was complete so that he
02:16:25 19 could answer any of our remaining questions and --
02:16:36 20 and then there would be an investment meeting at
02:16:39 21 [REDACTED] and a decision would be taken as to
02:16:43 22 whether we were going to invest in the fund and how
02:16:46 23 much.

02:16:49 24 Q. And do you have a general
02:16:50 25 recollection of what Mr. Merkin's response was when

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02:16:52 1 you described your process to him?

02:16:55 2 MR. STEINER: Objection to form.

02:16:55 3 Q. You can answer.

02:16:58 4 A. On this I have a specific
02:17:00 5 recollection. Mr. Merkin told me that this was a
02:17:07 6 privilege. And first, before he told me it was a
02:17:13 7 privilege, he clearly stated that I didn't get it.
02:17:17 8 And he stated that sentence again adding a "really,"
02:17:26 9 you really don't get it, do you? And after saying
02:17:28 10 that twice, he said that this was a privilege, you
02:17:31 11 don't get to ask questions. And to that I
02:17:36 12 responded: You don't get it. I have an -- I have
02:17:39 13 an obligation to my investors to ask these
02:17:43 14 questions. And might I add, Mr. Merkin, so do you.
02:17:47 15 Shortly after that, the meeting ended.

02:17:55 16 Q. Do you recall whether or not you
02:17:58 17 discussed conducting or meeting with Mr. Madoff with
02:18:02 18 Mr. Merkin?

02:18:10 19 A. Could you ask the question again?

02:18:12 20 Q. Sure.

02:18:13 21 Do you recall whether or not you
02:18:15 22 discussed with Mr. Merkin the possibility about
02:18:18 23 meeting with Mr. Madoff?

02:18:21 24 MR. STEINER: Objection to form.

02:18:26 25 A. My recollection might be that -- I

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02:18:31 1 wouldn't say it the way you just asked it. What I
02:18:35 2 would say is that my due diligence had to go through
02:18:39 3 him to Madoff or anyone else that he was giving
02:18:43 4 money to.

02:18:43 5 Q. Did you say that to Mr. Merkin at
02:18:46 6 that meeting?

02:18:47 7 MR. STEINER: Objection to form.

02:18:50 8 A. I -- my recollection is I did, and
02:18:53 9 that actually would have been prior to the comment
02:18:55 10 about the privilege.

02:19:25 11 Q. Was it a significant fact to you that
02:19:29 12 Merkin's funds gave money to Madoff to manage?

02:19:33 13 MR. STEINER: Objection to form.

02:19:39 14 A. Would you mind just -- you asked if
02:19:41 15 it was a significant fact?

02:19:43 16 Q. Was it important to you, was it an
02:19:45 17 important fact to learn that Merkin was giving his
02:19:51 18 funds' money to Madoff to manage?

02:19:55 19 MR. STEINER: Objection to form.

02:19:57 20 A. In my opinion, it's a show stopper.
02:20:01 21 And I would just say that without doing -- it's
02:20:05 22 another layer of lack of transparency, and we tell
02:20:09 23 our investors that we have transparency. And as a
02:20:13 24 fiduciary, I -- it was imperative that we understand
02:20:17 25 the investments and the decision-making in a fund